SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

No. 5

SIDNEY STREET,

*Appellant,*

*against*

PEOPLE OF THE STATE OF NEW YORK,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
*Amicus Curiae*
80 Centre Street
New York, N. Y. 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
*of Counsel*

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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### Statement of Interest of *Amicus Curiae*

The instant case involves the constitutionality of New York Penal Law, § 1425, subd. 16(d) (now General Business Law, § 136[d]), making desecration of the American flag a misdemeanor. Under New York law, each District Attorney in the counties of the State is charged with the responsibility of prosecution and with the upholding on appeal of convictions from such prosecutions (County Law, § 700), while as the chief legal officer of the State (New York Executive Law, § 63), the Attorney General is charged

with the defense of State statutes (Executive Law, § 71; N. Y. Civil Practice Law and Rules § 1012[b]). This brief, consequently, is submitted in support of the position that Penal Law, § 1425, subd. 16(d) is compatible with the First Amendment guarantee of freedom of speech.

## Questions Presented

1. Does New York Penal Law, § 1425, subd. 16(d), abridge freedom of speech as guaranteed by the First Amendment to the United States Constitution?

2. Is New York Penal Law, § 1425, subd. 16(d) void for vagueness?

## Summary of Argument

Flag desecration is not protected speech. The state has an interest in protecting this national symbol from public, physical contempt just as it can exact minimal loyalty oaths. Assuming, *arguendo*, that such desecration is "symbolic speech", it conveys no meaning of itself, but serves merely to dramatize words and, in light of the legitimate interest in protecting national symbols and maintaining public order, is subject to regulation.

Appellant may not attack the statute as void for vagueness since the issue was not raised in the trial court and there is no indication that either appellate court passed on the issue. In any event, the statute is neither imprecise nor overbroad. Not only is the statutory language easily understood but there is no evidence that it has ever been employed to punish speech alone. The statute is fully compatible with the interpretation of the Court of Appeals making speech merely evidence of the intent behind physical destruction.

## POINT I

**Flag desecration is not protected speech within the meaning of the First Amendment.**

The American flag is a national symbol which federal and state policy declare should be treated with respect and even with ceremony. 4 U.S.C. §§ 1-3; 36 U.S.C. §§ 172-177; Uniform Flag Act, 9B Uniform Laws Annotated. New York Penal Law, § 1425, subd. 16(d),* is designed simply to further this policy by declaring flag desecration a misdemeanor. It is neither the purpose nor effect of the statute to promote orthodoxy of thought, to stifle dissent or to prevent a single idea from reaching the market place.** The statute merely reflects the policy that some minimal respect for this symbol is desirable, that respect being no more than a prohibition of public acts of physical violence against the flag.

To forbid desecration of this symbol is no more a limitation on freedom of expression than is requiring an oath to uphold the Constitution of the United States. *Bond* v. *Floyd,* 385 U. S. 116, 132; *American Communications Association* v. *Douds,* 339 U. S. 382, 414; *Knight* v. *Board of Regents,* 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd.* 390 U. S. 36. Indeed, such an oath is an affirmative act requiring much more of a person than the refraining from an act of public flag mutilation. This minimal requirement of respect for the flag should be no less enforceable than such an oath. The importance of the flag as a national symbol

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* Now N. Y. Gen. Bus. Law, § 136(d).

** Legislation to protect the flag arose out of the 1896 political campaign in which the parties used the flag as an emblem. As a result, it was often mutilated. In addition, commercial use of the flag was widespread. See Prefatory Note to the Uniform Flag Act, *supra.* The New York legislation, first adopted in 1899, was designed to prevent both these evils. N. Y. Laws of 1899, ch. 12, § 1. See Gen. Bus. Law § 136(a)-(c).

has long been recognized. *Halter* v. *Nebraska,* 205 U. S. 34. While positive action, such as a salute, may not be required (*West Virginia* v. *Barnette,* 319 U. S. 624), surely the flag has enough importance that its public desecration can be forbidden without impairing any First Amendment freedom. As this Court said in *United States* v. *O'Brien,* 391 U. S. 367, 376: "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engagaing in the conduct intends thereby to express an idea."

Similarly the forbidding of flag desecration does not violate the First Amendment. It is beyond plausible dispute that such desecration is not speech. Appellant, recognizing this insists, that it is "symbolic speech". However, public destruction of the flag, unless explained, conveys no particular meaning. Once it is explained, and the exact nature of the protest is manifest, the mutilation of the flag is merely incidental to the thought conveyed by the words and is simply an act to dramatize the thought. Such conduct, like picketing and draft card burning, is subject to regulation. *United States* v. *O'Brien, supra; Adderly* v. *Florida,* 385 U. S. 39; *Cox* v. *Louisiana,* 379 U. S. 536. Indeed, picketing and draft-card burning can be said to be speech much more readily than flag-burning because, while they are specifically directed at the object of protest, flag-burning almost invariably is not. It cannot be said either to articulate the views of its perpetrator or to be an effective means toward implementing those views.* Certainly it is not a necessary means. Its lack of direct mean-

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* In the instant case, for example, the precise nature of appellant's protest would be impossible to discover but for his statements. Moreover, the notion that he may have been prosecuted for his words is not only unsupportable by the record but also is ludicrous in view of the fact that his outrage at the shooting of James Meredith must certainly have found sympathy among most citizens of New York, including the Judges on the New York Court of Appeals.

ing, the offensive nature of the act to a significant portion of the populace, its repugnance to national policy, the myriad avenues open for expression of ideas, including criticism of the public officials felt too responsible for the policies and events under attack, and the likelihood of public disorder, make flag-burning, on balance and whatever its speech content, limitable by law. And certainly, to the exent that we may have national symbols, we can accord them this minimal protection.

Appellant seems to place symbolic speech on a par with it not higher than other speech. He appears to suggest that the views of Professors McLuhan and Marcuse require constitutional recognition. Whatever impact the mass media and their tendency to cover the sensational must eventually have on our view of the First Amendment is of no moment here. Appellant's access to a wide audience is irrelevant. There is no constitutional right to go on radio or television. *National Broadcasting Co.* v. *United States,* 319 U. S. 190. Moreover, the right to have an image conveyed is not the same as "symbolic" speech. Since there is no right to be guaranteed the attention of the public at large, his belief that the drama of flag-burning will more readily be reported than the opinion behind it accords appellant no greater right to do what the statute forbids.

## POINT II

**Penal Law § 1425, subd. 16(d) is not void for vagueness.**

Appellant contends that Penal Law § 1425, subd. 16(d) is both overbroad and imprecise. The contention is without merit. The first point which must be made with respect to this claim is that it was not raised in the trial court. Appellant did not contend, at the most obvious

point in the proceedings against him, that he did not understand the charges against him or that the statute was incomprehensible to him. Although he did raise the issue subsequently for the first time in both the appellate courts, the Appellate Term of the State Supreme Court wrote no opinion and the Court of Appeals made no reference to the claim. No application to amend the remittitur was made and so it appears that the question of vagueness was never passed upon by the state courts as it was never properly presented to them. See *People* v. *DeRenzzio*, 19 N. Y. 2d 45 (1966); *People* v. *Friola*, 11 N. Y. 2d 157 (1962). Accordingly, the issue is not properly before this Court. See e.g. *Ker* v. *California*, 374 U. S. 23.

Wholly apart from this, reliance upon this contention is simply a dialectical exercise without any real application to the case before the Court. Appellant's main quarrel is with that portion of the statute which forbids casting contempt by words or act upon the flag. However, it is clear that the New York Court of Appeals construed this act merely as descriptive of the physical act of flag-burning and it is also clear that no New York case contradicts this construction of the statute. Those words, in short, limit rather than expand the meaning of the statute. The relevance of words in general to the statute is simply that they provide evidence of the intent required to impose a criminal sanction. See *State* v. *Schlueter*, 127 N.J.L. 496, 23 A. 2d 249 (N. J. 1941).

In any event, it is clear from the trial record and from the opinion of the Court of Appeals that appellant was convicted for the physical act and not for any words which he might have uttered and that, therefore, the statute is constitutional as applied to him. *Stromberg* v. *California*, 283 U. S. 359.

## CONCLUSION

**The decision of the Court of Appeals of the State of New York should be affirmed.**

Dated: New York, N. Y., October 3, 1968.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BRENDA SOLOFF
Assistant Attorney General
*of Counsel*